complainant seeks, and to grant the last prayer of the bill, and thereby restrain the defendants from organizing the company, would be to destroy the corporation itself, which in this proceeding we have no power to do; should we assume the power, we have already shown that we would prevent, by the order of a court of chancery, the defendants from the performance of a duty, which upon the common law side of our own court we would by *mandamus* compel them to perform.

The further consideration of the other points presented on the argument of the cause becomes now unnecessary, and, in conclusion, we can only say that, while, with our view of the facts of this case, we would consider ourselves obliged to afford relief, our view of the law, as administered in courts of equity, obliges us to deny the motion; to grant it would be to usurp a jurisdiction which we do not possess. There is, however, a satisfaction in knowing that the letters patent can be repealed, and the corporation destroyed, by a proceeding at law, to be instituted by the attorney general of the commonwealth.

The motion for a special injunction is refused.

In the District Court for the City and County of Philadelphia.

RICHARDS' ADMINISTRATOR *vs.* DAVIS.

1. A pledge for a loan of money to be repaid at a *fixed* time, may be sold by the pledgee, after the time for redemption has gone by, and a demand for repayment duly made, provided reasonable notice be also given to the pledger, of the time and place of the intended sale.
2. The law is the same where the pledge is a promissory note of a third person, when the note will not mature until long after the time fixed for repayment of the loan.

STROUD, J.—The matter in dispute in this case was referred, by agreement of the parties, to a referee, under the sixth section of the Act of Assembly relating to reference and arbitration, passed the 16th day of June, 1836.

On the hearing of the parties, the referee made an award, that there was due from the defendant to the plaintiff the sum of $331 and costs of suit.

By a statement, in writing, of the referee, it appears that, in the month of April, 1857, William H. Richards, Jr., the intestate of the plaintiff, being the owner of a promissory note for $1,100, dated April 4th, 1857, made by *M. E. J. C. Crees*, payable after four months to the order of *Morgan H. Jones*, and by him endorsed, and also endorsed by *Howard Tilden*, was desirous of selling, and for this purpose entrusted it to a friend, who employed *Edward S. Jones* as a *note broker*. *Jones* made an effort to sell the note, but met with no success. On the 22d of April, 1857, he *pledged* the note to the defendant for a loan of $490, to be repaid on the 2d of May, 1857.

The money so obtained was not repaid at the time stipulated, and on or about the 10th of May, 1857, Davis told *Jones* that he must come and pay the loan, or he would be obliged to sell the note. *Jones* begged for a few days' delay, but made no objection otherwise to the *defendant's* communication.

Subsequently, *the defendant* placed the note in the hands of a broker for sale, who, after the 20th of May, 1857, sold it for $800. After deducting a commission of $10, the broker handed the balance, $790, to the *defendant*. The *purchaser* of the note was *Tilden*, the endorsee. The referee finds that the sum for which the note was sold was the highest price that it would bring.

In June, 1857, a tender was made to the defendant, in behalf of the plaintiff's intestate, of all the money then due on the loan, and a simultaneous demand was made on the defendant to return the note. This request not having been complied with, the present suit was instituted to recover the value of the note.

The award of the referee was for the difference, with interest, between the $490 loaned to the plaintiff's intestate by the defendant, and the $790, the net proceeds of the note sold by order of the defendant.

The important facts thus presented are, that the pledge was a negotiable promissory note, endorsed by the payee, and afterwards

by a third person—the time for its redemption *fixed*, and this time would happen long before the maturity of the note. A demand for redemption was duly made by the pledgee—and a reasonable time after the demand for redemption having passed, without payment of the money loaned, the pledgee, through the agency of a note broker, sold the note for the best price which could thus be obtained for it. No notice of any kind was given to the pledger subsequent to the demand for redemption of the note.

The exceptions to the award of the referee require a consideration of the following propositions: 1. Whether, when the pledge is a *negotiable promissory note*, and actually negotiated, the pledgee is restricted, in the use of means to reimburse himself, to an action at law upon the promissory note—or whether a pledge of this description is subject to the same rules of law which apply to pledges of movable goods, stocks, and other securities not strictly negotiable.

2. Whether, where no special contract has been made between the parties, and the pledge being a promissory note, has not been redeemed within the appointed time and after notice to redeem has been given, the pledgee may sell the note, through the agency of a note broker, without giving notice to the pledger of the time and place of the intended sale, or of the name and place of business of the broker, and such other particulars as may be appropriate to the nature of the pledge.

The *first* proposition has been suggested by the 321st section of Story on Bailments. It is there said, "Where the pledge is a *negotiable security* (such as a negotiable note), the pledgee has a right to recover and receive the money due thereon, and to sue for it in his own name. But he has no right (unless, perhaps, in a very extreme case) to compromise with the parties to the security for a less sum than the sum due on this security; and if he does, he will be compelled to account to the pledger for the full value."

No other writer on this subject, it is believed, has made a similar statement. *Judge Story* refers to none. He relies entirely upon two reported decisions—*one*, *Bowman* vs. *Wood*, 15 Mass. R. 534; the *other*, *Garlick* vs. *James*, 12 Johns. R. 146.

Bowman vs. *Wood* was assumpsit by the endorsee against the

maker of a negotiable promissory note. The plaintiff, a deputy sheriff, having an execution against one *Hodge*, received from him the note in question as a pledge or collateral security for the discharge of the execution; the note being signed by the defendant, and endorsed in blank by *Hodge*. The plaintiff (the pledgee) kept it for two months, and then advertised it, as the property of *Hodge*, and sold it at *auction* to *himself*, as the highest bidder, of which he made return on the execution. The note was due when it was endorsed by Hodge, and transferred to the plaintiff as a pledge. Here the action was not between the pledger and pledgee. The pledger was the payee and endorser of the note, and the action was *upon the note*, against the *maker*. There seems not to have been any dispute as to the genuineness of the note, nor was there any lapse of time which could avail the defendant as a bar, nor any allegation of *mala fides*, in any respect, as to the conduct of the plaintiff to the defendant. The only defence which was open to the defendant, was *payment*. This was the view of the Court. "The note," it was said, "being negotiable, having been endorsed for a valuable consideration, and there being no proof that it has been paid, the plaintiff is, *of course*, entitled to recover."

This was the only point decided by the court. As the holder of a promissory note, given for value and endorsed and delivered for value, the plaintiff had, *prima facie*, a good cause of action, which nothing offered by the defendant conduced at all to overcome.

The plaintiff had given evidence, it would seem, of the facts, that he had obtained the note of the endorser as a *pledge*, and had afterwards advertised and sold it as the property of the *endorser*, under the execution which had been put in his hands against him, and that he had become, *as he supposed*, the purchaser of the note in that way. But the court declared this procedure had conferred no title to the note.

In reference to the transfer of the note by the endorser to the plaintiff, as a *pledge*, the court used the language, "having received it as a *pledge* for the payment of the execution, he must account to the endorser for the proceeds."

This remark is the only ground which this decision affords for

the broad principle of the text in the law of bailments. And this remark, though true, was manifestly *extra-judicial*, and, consequently, possessed no binding force, even on the court that made it.

It is plain that, whether the plaintiff's title to the note was derived from the endorsement and delivery by *Hodge*, or from the pretended sale on the execution, it was of no importance as a *defence* to the *maker*. The case therefore determines nothing, nor does the opinion even *extra-judicially* express anything which substantiates the main principle of the text.

Garlick vs. *James*, undoubtedly involved the consideration of the law relative to the power of a pledgee and the mode of proceedings to enforce payment of money for which the pledge was given. The action was brought by the *pledger* against the *pledgee*. The declaration is a special one, claiming damages for the abuse by the pledgee of his power over the pledge, and the pledge was a *negotiable promissory note* which had several years to run *before* maturity.

The note bore date November 1, 1802, was for $600, payable on November 1, 1807. The maker was *Seth* Garlick, and the payee *Samuel* Garlick, the plaintiff. On the 29th of January, 1803, the plaintiff being indebted to the *defendant James*, in the sum of 300 dollars, the *plaintiff* pledged this note to the *defendant*, to secure the debt due by him and a co-debtor. *No time was* FIXED *for the redemption of the pledge.*

The defendant retained the note until some time in 1810, when he gave it up to the *maker*, receiving in exchange a note for $300 of a *third* person. This latter note was subsequently paid to the defendant. It was testified by *Seth* Garlick, the *maker* of the note pledged and afterwards surrendered, that he was at the time and continued to be abundantly able to pay the whole amount ($600) of the pledged note.

It is stated in the opinion of the court, not only that the pledge was for an *indefinite* time, but that the pledger *was never called upon to redeem.*

The pledge, consequently, had never been forfeited, and it had been given up to the maker, abundantly able to pay the whole

amount on its face, in exchange for a note for *one-half* of its value. The point for which the decision of the court is referred to by *Judge Story*, did not arise in the case.

It would involve no inconsistency to acquiesce in the principles and in the very points of both these decisions, and at the same time withhold assent to the proposition in the law of bailments.

Where, as in *Bowman* vs. *Wood*, the promissory note was due when it was pledged, and could therefore be sued upon immediately, there might, perhaps, be some reason to infer, in the absence of any agreement to the contrary, that the purpose of the parties was to restrain the pledgee to an action upon the note. For this course would be open to him although the time of redemption had not yet arrived, and even might be quite distant. But that a pledge of this kind is subject to the same law, where the time for redemption is *fixed*, and must happen *long before* the maturity of the note, and consequently long before a suit can be brought upon it, has neither reason nor convenience to recommend it. Practically such a law would render the obtaining of a loan on *such* a pledge, impossible.

We find, therefore, no ground of exception to the award on this score.

But the opinion of the referee went beyond this question, and decided that it was *not* a part of the law of pledge, that notice should be given to the pledger, of the *time* and *place*, when and where, after the period for redemption of the pledge had passed, the pledgee intended to sell or otherwise dispose of the pledge in order to reimburse himself.

The chief ground of this opinion seems to have been the instructions to the jury in *De Lisle* vs. *Priestman*, 1 P. A. Browne's Rep. 176.

It is not necessary to narrate particularly the facts of that case. It is enough to say, that the action was brought by the *pledger* of a large number of shares of stock in an Insurance Company, to recover damages of the pledgee for a refusal to *re*-transfer such stock which had been assigned to him at the giving of the pledge.

The concluding part of the charge of the judge who presided on the trial was, "if you think, upon a view of the whole evidence, the

stock was pledged for an *indefinite* period of time, and sold without notice to the plaintiff, your verdict should be in his favor, for such damages as in your judgment he ought to recover. *But if you think the stock was pledged for a* FIXED *period of time, your verdict should be for the defendant.*

Upon the first branch of these instructions there is a general agreement, in the authorities, with the ruling of the court, and as the jury found that the pledge had been made without an agreement *fixing* the time for the repayment of the loan, the directions upon the *second* branch become of no importance to any one concerned in the cause.

It is quite clear, we think, that the court fell into a mistake on the second branch of the charge, which related to a pledge made on a loan to be repaid at a *fixed* time.

As early as 1714, a decision was made by the *House of Lords*, on a state of facts which presented this very point.

There are two reports of this decision: one in 1 Peere Williams, 261, entitled *Tucker* vs. *Wilson;* the other in 1 Brown P. C. 494, where the names are *Wilson* vs. *Tooker, adm'r of Thynne.* The names ought to be given as *Brown* has given them. His report is more precise and full in the statement of the case, and the argument of counsel is at greater length, and goes more into details in reference to the facts. *Wilson* lent to *Thynne* a large sum of money, for which *Thynne* assigned to him certain *exchequer annuities*, and at the same time *Wilson* gave a defeasance, covenanting, on repayment of the money lent and interest on a *named* day, he would re-assign the annuities to *Thynne*, &c. The time *fixed* for the re-payment of the loan was January 8th, 1709. In April, 1710, *Thynne* died without having paid any part of the money which he had borrowed, and *Tooker* received letters of administration with the will annexed, &c. *Wilson* repeatedly requested the re-payment of the loan, but without success, when, according to *Brown*, "by a letter dated the 24th of March, 1711, he gave notice to *Tooker*, administrator of *Thynne*, that he would proceed to sell the *annuities*, at the *Exchange*, on *Wednesday*, the 2d of April then next, and desired him to attend at that time, to see that

they sold for the highest price the market would then yield. But when the day came, *Tooker* desired a postponement of the sale to the *Monday* following, and underneath an attested copy of *Wilson's* letter of notice, wrote the following words: "Mr. Wilson, I desire you would suspend the sale of the annuities till *Monday* next, and you will very much oblige your very humble servant,

JAMES TOOKER."

"The money not being paid, nor any further delay requested, the annuities were, on the 7th of April, 1712, sold by an eminent bro-broker on the *Exchange*, for the highest price which they were then worth."

This narrative is taken almost *verbatim* from *Brown's* report. In his preface, he takes credit to himself for "*a particular attention to dates*," and this report certainly affords a good illustration of his *precision* in this respect.

On a *first* perusal of *Brown's* report, giving him credit for *accuracy* as well as *precision*, in his dates, the proper conclusion seemed to be that at least *a year* had intervened between the time fixed by *the notice* of the *lender* to the administrator of the *borrower*, for selling the annuities and the *actual* time of the sale. On close examination, however, of other parts of his statement, and especially of *facts* contained in the *argument* of counsel, it seemed clear that this could not have been so—that the sale *must* have taken place at or about the *time*, whatever that was, to which it had been postponed at the solicitation of Thynne's administrator.

The *Almanacs* of 1712 showed that April 2d of that year fell on *Wednesday*, which was named in the letter of March 24, 1711, as the time of the *intended* sale; the *next* Monday, to which *Tooker* had requested a postponement, would be *April* 7, 1712,—the very day on which *Brown* states that the sale took place.

The *apparent* discrepancy in the dates is entirely removed by the fact, (which one living at the present day may be excused for not reverting to at once,) that at the period of these transactions the *legal* year began on *March* 25, and consequently that March 24, 1711, (the date of the original notice by the lender,) was the *last* day of that year; and of course April 2, "*then next*," as the notice

said, was April 2, 1712,—and *five* days future, would be *Monday*, April 7, 1712—THE ACTUAL DAY OF THE SALE.

The case, therefore, as reported by *Brown*, in so far as the facts are important, furnishes clear evidence that not only was there a demand for re-payment of the loan, after the time *fixed* for that purpose had gone by, but an exact notice of the *time* and *place* of the *intended* sale was given by the lender to the borrower, *and that this notice was strictly complied with in the actual sale.*

It was determined *by the House of Lords*, that the course pursued by the pledgee was a proper one, and the sale valid.

On the trial of *De Lisle* vs. *Priestman*, this decision of the House of Lords appears to have been cited by the counsel of the defendant. It is manifest, therefore, that the decision was not rightly apprehended, for there was no pretence that the defendant had given notice to the plaintiff of his intention to sell the stock at a particular time and place, and consequently, instead of aiding the defence, its plain effect was directly the other way.

Peere Williams' report was *that* cited in *De Lisle* vs. *Priestman.* In general, he is to be regarded as an accurate reporter. But in the case in the House of Lords—*Tucker* vs. *Wilson*, as he has it—his statement, on the important point whether the sale of the pledge took place on the *day* appointed for the purpose, is calculated to induce the belief that there was *no* such correspondence. For having mentioned that there was a *fixed* time for the repayment of the loan, that it was not then repaid, he proceeds to say, "upon which the lender frequently desired the money, and gave notice that he would sell, and *appointing a time* for that purpose, desired the borrower to be present to see that the annuity was sold at the full value. The borrower, by letter, desired that the lender would stay a week longer before he sold, which was also complied with."

Thus far the statement is neatly and clearly given. But immediately following is this language: "And *then* the lender, *dying suddenly*, the defendant, *his administrator*, sold the annuity at the Exchange, by a sworn broker, for the full value that those annuities then sold for."

Here, by the interpolation of the words, "and then the lender, *dying suddenly*, the defendant, *his administrator*, sold the annuity," &c., the necessary inference is that the time to which the sale had been postponed, elapsed in *the life time* of the lender; that some time was taken up in procuring letters of administration, that the administrator then entered upon his duties, and without any *fresh* notice the annuities were sold by him.

We thus get from the whole statement the impression that the borrower, finding himself unable to repay the loan within the time for which he had solicited and obtained a postponement of the sale, abandoned the pledge, and afterwards the administrator of the lender sold it at his own convenience. If this were so, the facts would not warrant the opinion that a sale, to be valid, should be preceded by a notice to the pledger of the *time and place* when and where the pledge was intended to be sold.

From the way in which the case stood in the House of Lords, it is not, perhaps, a necessary conclusion, that the judgment of that tribunal depended upon the notice of sale given by the pledgee to the pledger.

The case was brought into the House of Lords on an *appeal* from the decree of *Lord Chancellor Harcourt*. *Lord Harcourt* decided that a pledge could not be sold by the pledgee, without a *foreclosure* of the right of redemption in chancery. The *House of Lords* reversed this decree. But it is to be borne in mind that on *appeals* the cause is regarded, essentially, as a proceeding *de novo*. Not only is a wrong judgment to be *reversed*, but a *right* one is to be entered. It was so in that case. The judgment of the House of Lords is set forth at length in *Brown*.

Chancellor Kent, both in *Hart* vs. *Ten Eyck*, 2 Johns. C. Reports, 100, and in his Commentaries, vol. 2, p. 582, speaks of "a reasonable previous notice to redeem," as a prerequisite to the sale. "This," he adds, "was settled in the case of *Tucker* vs. *Wilson*, and *Lockwood* vs. *Ewer*." And so the Supreme Court of Massachusetts states the law to be, citing the same cases which are referred to by *Chancellor Kent*, superadding the authority of his decision in *Hart* vs. *Ten Eyck*, and in the *Commentaries*. *Parker* vs.

Branker, 22 Pick., 46. Notice of the *time* and *place* of the intended sale of the pledge, is not mentioned as requisite by either of these eminent authorities, whilst both insist upon "a previous notice to the debtor to *redeem*" as indispensable, and a reference is made in both, to *Tucker* vs. *Wilson*, as the precedent for this opinion.

Why both these authorities should *infer*, from *Tucker* vs. *Wilson*, that it was indispensable on the part of the pledgee to give special notice to the pledger to *redeem*, and *pass over*, as if unimportant, the *notice of the time and place of sale*, can hardly be accounted for on any other supposition than that the latter subject was obscured by *Peere Williams*, and the dates of *Brown*, owing to the change in the calendar in 1752, not apprehended.

Each kind of notice is mentioned in the reports, and in the argument of counsel, contained in *Brown*, notice of the time and place of sale is distinctly mentioned as part of "the known and constant practice, in the case of mortgages of such securities, where the money has *been neglected to be paid* at the *time stipulated*, TO PROCEED TO A SALE ON GIVING EIGHT OR TEN DAYS' NOTICE."

And inasmuch as when a time for redemption is *fixed*, the borrower might well be considered as needing no further notice on that head, it would seem much more reasonable to dispense with this than to permit a *sale* of the pledge to be made without distinct warning to the pledger.

Judge Story is quite explicit and positive in requiring *notice of the sale* to be given. "He (the pledgee) may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledger." Law of Bailments, § 310. He does not, it is true, cite *Tucker* vs. *Wilson* for this, and the authorities which he does cite can hardly be said to bear him out. But he lays down the necessity of notice of the sale without any qualification, and the Supreme Court of New York, in *Stearns* vs. *Marsh*, 4 Denio, 227, covers the whole ground of notices, as well in respect to redemption as to the time and place of the intended sale. Both are held to be indispensable.

It may, perhaps, be asked, of what practical value can it be to the pledger of a *promissory note*, to be informed by the pledgee

that he has placed the note in the hands of a broker, to be disposed of by him in the usual manner of such securities.

When the pledge consists of *movable goods*, they are generally sold at *public auction*, after proper advertisement in the newspapers. And it is obvious enough that notice of the time and place of sale may be advantageous to the pledger.

Stocks, and similar securities, are sold at the brokers' board. Notice of the time and place may, unquestionably, be rendered serviceable to the pledger, who may influence his friends and others to give orders to purchase, which may insure the full market value.

The mode of selling *promissory notes* through the agency of a note broker, cannot, perhaps, be quite so readily turned to account by the pledger. Yet, as the name and place of business of the broker must be furnished to the pledger a reasonable time before the actual sale should be made, we are assured, by very competent authority, that the pledger may frequently advance his interest, by procuring friendly purchasers to apply to the broker, or by substituting other pledges better suited to the existing demands of the market, or by recourse to other legitimate expedients, which a shrewd and well informed broker with whom, *by the notice*, he may be put into communication, may suggest.

And whether or not such notice be likely, in general, to result beneficially to the pledger, the *chance*, whatever may be its worth, is his *right*, and a proper administration of the law demands its protection.

The first and second exceptions taken by the plaintiff are sustained, and the award set aside.

Award set aside.

In the Circuit Court of the United States.

PAUL T. JONES *vs.* THE FLOATING ZEPHYR. L. G. MYTINGER &c. *vs.* THE SAME.

Where a ship is detained in port by ice, and her cargo is damaged before the season allows her to proceed, though she subsequently delivers it to the consignees, a shipper cannot, without rescinding the contract, sustain a libel *in rem* for a breach of the bill of lading, until the term for the performance of the contract has expired.